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No. 84-1610 (2)

IN THE

OCTOBER TERM, 1984

LUTHER CRAIG SMITH,

Petitioner,

VS.

FCX, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATUTES AND RULES INVOLVED

S.C. Code of Laws §42-1-400: Liability of owner to workmen of subcontractor.

When any person, in this section and §§42-1-410 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S. C. Code of Laws §42-1-540: Employee's

rights and remedies under Title exclude all others against employer.

The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

S.C. Supreme Court Rule 46(1): Rule for Certification of Questions of Law.

Section 1. The Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the hightest appellate court or an intermediate appellate court

of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

STATEMENT OF THE CASE

FCX, Inc., is engaged in the business of providing goods and services to farmers in North Carolina and South Carolina. FCX owns and operates retail service centers, grain markets, and fertilizer plants. One service center and grain market is located between Latta and Dillon, South Carolina. The grain market buys grain from local farmers and sells it to various concerns, including other facilities owned and operated by FCX. The grain market also stores grain in on-site bins. The Latta-Dillon FCX grain market has ten (10) bins with a total storage capacity of between three hundred fifty thousand (350,000) and four hundred thousand (400,000) bushels. (App. 64.)[1]

[1] References are to the Joint Appendix filed with the Court of Appeals.

Grain purchases are seasonal. Wheat and oats are harvested and sold by farmers in late spring and early summer. Corn is harvested in late summer and soybeans are harvested after that. Grains, as harvested by farmers, generally have a moisture content greater than is desirable. Grains with moisture content greater than specified levels, depending upon the grains, will spoil in storage. (App. 64.) Of particular concern is corn. As harvested, corn normally has a moisture content of fifteen to twenty-five (15%-25%) percent. If corn is stored with a moisture content greater than thirteen (13%) percent, a mold, aspergilus flavus, will grow. A by-product of this mold is aflatoxin which is highly poisonous to livestock. (App. 99.)

The moisture content of grain is reduced by means of a dryer. This is a special bin into which grain is put and hot air is forced through to dry the grain. Very few farmers have dryers on farms. (App. 65.) If a grain market did not have a dryer, it could not purchase grain with excessive moisture. (App. 66.) FCX owned and operated seventeen (17) grain markets. There was testimony that all but two of the grain markets had dryers. The head of the FCX maintenance department could name only one market which had no dryer, and that market had a storage capacity of only forty thousand (40,000) bushels. (App. 93.) In 1978, FCX found it necessary to install a larger dryer at its Latta-Dillon grain market as the older one could not take care of the wet grain. (App. 72.) While it is

not a frequent occurrence, FCX sometimes finds it necessary to dry corn that is already stored in one of the bins. (App. 100.)

In 1980, FCX had a maintenance department for its grain markets and fertilizer plants. Walter Douglas Godwin was manager of that department. In May of 1980, the manager of the Latta-Dillon FCX service center called Godwin to come to the grain market to service the dryer so that it would be ready for the upcoming wheat and oats season. (App. 66.)

When he arrived, Godwin found that some of the electrical wires and sensors on the dryer needed replacing. As FCX employed no electricians, Godwin called Smith & Sons, a heating, air conditioning, and electrical contractor, to make the electrical repairs. Smith & Sons had done electrical work for

FCX many times before at this facility and other facilities. Smith & Sons was paid on a per job basis. (App. 18.) There was no on-going contract between FCX and Smith & Sons.

Smith & Sons was owned by Carlisle Smith. The Petitioner was employed as an electrician's helper. The electrical wires and sensors on the dryer were replaced and Godwin attempted to light the dryer. When the dryer would not ignite, Godwin and Carlisle Smith began looking at a schematic diagram of the dryer's electrical controls to see if they could determine the problem. (App. 30, 74-75.) While the electrical schematics were being studied an explosion occurred, resulting in injuries to the Petitioner.

ARGUMENT

The South Carolina Worker's Compensation law was enacted in 1936. Its purpose is to provide compensation to employees injured on a job regardless of whether the employer is at fault. As a trade off for the employee having a right to compensation when injured regardless of fault, the compensation law provides that worker's compensation will be the exclusive remedy of the injured worker, and the right to maintain a common law action for negligence against an employer is abolished. S. C. Code of Laws § 42-1-540 (1976); Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980). To further promote the intended purpose of the Worker's Compensation law and to insure that all workers will receive benefits,

provisions such as South Carolina Code of Laws §42-1-400 are included. Under this section, if an owner of property subcontracts out a portion of his trade, business, or occupation and a worker of the subcontractor is injured, the owner is obligated to provide worker's compensation benefits if the subcontractor does not carry worker's compensation insurance. Marchbanks v. Duke Power Company, 190 S.C. 336, 2 S.E.2d 825 (1939). Because the owner has this potential liability for worker's compensation benefits, he is also entitled to the same immunity from common law negligence actions. Parker v. Williams & Madjanik, Inc., supra; Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957).

Since Marchbanks v. Duke Power Company, supra, the South Carolina Supreme

Court has had many occasions to determine the applicability of §§42-1-400 and 42-1-540. These sections have been construed in the context of determining whether a person was a statutory employee and, therefore, entitled to worker's compensation benefits,[2] and in the context of determining whether a person is a statutory employee and thereby barred from maintaining a liability action.[3]

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[2] See, e.g., Boseman v. Pacific Mills, 193 S.C. 479, 8 S.E.2d 878 (1940); Smith v. Fulmer, 198 S.C. 91, 15 S.E.2d 681 (1941); Kennerly v. Ocmulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792 (1945); Hopkins v. Darlington Veneer Co., 208 S.C. 307, 38 S.E.2d 4 (1946); Miles v. West Virginia Pulp & Paper Co., 212 S.C. 424, 48 S.E.2d 26 (1948); and Pyett v. Marsh Plywood Corp., 240 S.C. 56, 124 S.E.2d 617 (1962).

[3] See, e.g., Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1939); Adams v. Davison-Paxon Co., 230 S.C. 532, 96 S.E.2d 566 (1957); Bell v. SCE&G Co., 234 S.C. 577, 109 S.E.2d 441 (1959); Wilson v. Daniel International Corp., 260 S.C. 548, 197 S.E.2d 686 (1973); and Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101 (1979).

The South Carolina Supreme Court has recognized that no one formula can be laid down, but each case must be decided upon its own factual basis. Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963).

The Petitioner's first question presented seeks to have the Supreme Court review factual findings of the District Court and the Court of Appeals and the applicability of South Carolina law to those facts. This is not the kind of question which warrants issuance of a writ of certiorari.

Contrary to Petitioner's position, this case does not involve the question whether the citizens of South Carolina are being treated differently from the citizens of Virginia, or any other state, under the same law. At issue is the applicability of the South Carolina Worker's Compensation

law to the facts of this case. The interpretation of another state's law is not at issue. It was the duty of the District Court and the Court of Appeals to decide this diversity case based upon the South Carolina law. How the Court of Appeals may have applied a similar statutory provision of Virginia in another case is irrelevant. In a diversity action, a federal court is bound by the law of a state as interpreted by the highest court of that state. There is no conflict in the way the Fourth Circuit Court of Appeals applied the law in this instance and the way it has been applied by the South Carolina Supreme Court.

The Petitioner argues that a different test for determining statutory

employee status was used here than that used by the District Court in Dickerson v. Eastman Kodak Co., 569 F.Supp. 1221 (D.S.C. 1983). An entirely different factual situation existed in Dickerson. In Dickerson the plaintiff was an employee of a common carrier engaged to transport defendant's goods to customers. All of defendant's trucks were used for purposes other than the transportation of goods to customers. The defendant always used common carriers for this. Under the facts of that case the District Court held that transportation of goods by the common carrier was not a part of the defendant's manufacturing business and the plaintiff was not a statutory employee. Here FCX had a maintenance crew for its bulk grain handling facilities. That crew was performing maintenance on the grain

elevator and dryer when the explosion occurred. Maintenance was a part of the trade, business or occupation of FCX.[4]

As presented in Petitioner's second question, Petitioner is also seeking certiorari because the Court of Appeals did not certify this case to the South Carolina Supreme Court. South Carolina Supreme Court Rule 46, which became effective September 8, 1982, provides that a federal

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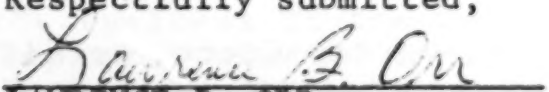
[4] This is analagous to the wood processing cases in which the South Carolina Supreme Court has held that a person cutting and hauling timber to a processor is not an employee for worker's compensation purposes where he merely supplies the timber to the processor. Pyett v. Marsh Plywood Corp., 240 S.C. 56, 124 S.E.2d 617 (1962); Miles v. West Virginia Pulp & Paper Co., 212 S.C. 424, 48 S.E.2d 26 (1948). But in instances when the processor also owns the timber and engages the logger merely to cut and transport its timber to the processing plant, the logging operation is considered a part of the business of the owner, and statutory employee status is accorded. Hopkins v. Darlington Veneer Co., 208 S.C. 307, 38 S.E.2d 4 (1946); Kennerly v. Ocmulgee Lumber Co., 206 S.C. 481, 34 S.E.2d 792 (1945).

court may certify to the South Carolina Supreme Court a question of law of South Carolina "as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." S. C. Supreme Court Rule 46(1). At issue here is the application of the South Carolina Worker's Compensation law to the facts of this case. There was ample precedent in the decisions of the South Carolina Supreme Court, since 1939, to determine whether the Petitioner was a statutory employee and barred from maintaining this action. The Fourth Circuit Court of Appeals has applied this law to factual situations on numerous occasions. As there was controlling precedent in the decisions of the South Carolina Supreme Court, certification on this point was unnecessary and unwarranted.

CONCLUSION

The Fourth Circuit Court of Appeals applied the well established law of South Carolina to the facts of this case, and held the Petitioner was barred from maintaining a negligence action against FCX as he was a statutory employee within the meaning of the South Carolina Worker's Compensation law. There is no question of federal law in conflict with the laws of South Carolina. The S. C. Supreme Court has spoken many times in interpreting the applicable statutes and there was no need to certify the case to the South Carolina Supreme Court for interpretation of the state law. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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